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HAROLD B. WILEY

No. 760

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CITATIONS

Case:

United States v. *Penn Foundry & Mfg. Co.*, 337 U. S. 198, 215–216 9

342899—55

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 762

LYLES & LANG CONSTRUCTION COMPANY, PETITIONER

v.

E. I. DU PONT DE NEMOURS & COMPANY AND UNITED STATES OF AMERICA

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of South Carolina (1 R. 1–37) is not reported. The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1a–32a) is reported at 219 F. 2d 328.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1955 (App. 32a). The cross-petition for a writ of certiorari was filed on

[1] Appendix references herein are to the appendix of the petition filed on behalf of du Pont in No. 785, this Term.

May 2, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the subcontract between du Pont and Lyles & Lang authorized du Pont to terminate it prior to the construction, and acceptance for occupancy, of dormitories which Lyles & Lang contracted to construct, furnish, and operate at the Savannah River project of the Atomic Energy Commission.

2. Whether 30 days' written notice of termination was given to Lyles & Lang by du Pont.

CONTRACT PROVISION INVOLVED

The subcontract between Lyles & Lang [referred to in the contract as "Operator"] and du Pont provides, in pertinent part, as follows (3 R. 564–566):

> SECTION 3.
>
> * * * * *
>
> (b) Termination for Convenience of Commission. This Agreement or any part thereof may be terminated by du Pont subject to the approval of the Commission, for the convenience of the Commission. Any such termination shall be effective upon thirty (30) days' written notice by du Pont to the Operator setting forth the extent to which performance under this Agreement is to be terminated and the date upon which such termination becomes effec-

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tive, in which case du Pont will pay the Operator a Lump Sum to be determined in accordance with the following table on the basis of the number of buildings ready for occupancy on the date of termination. This Lump Sum is in addition to any rentals that have been received by the Operator up to the date of termination. By payment of such amount or amounts, du Pont will thenceforth be relieved of any further obligations under this Agreement, with respect to the building or buildings terminated.

* * * * *

[Lump Sum table omitted in printing]

In the event of termination of this Agreement on one or more of said dormitory buildings prior to twelve months following the date of occupancy of such building or buildings, du Pont shall pay the Operator a sum equal to the actual costs that have been incurred by the Operator in connection with such building or buildings plus twenty per cent (20%) of such actual costs for overhead and profit. Actual cost as used herein shall be defined as all out-of-pocket expenses that have been incurred by the Operator in connection with such building or buildings up to the date of termination, including, but not limited to, the acquisition of land, construction, furnishings, operation, and maintenance together with the net costs required to settle any outstanding obligations that may have

been incurred up to the date of termination but not including any costs for personal time or services rendered by the principals of Lyles and Lang Construction Company (Operator), to wit: Dan D. Lang and John T. Lyles. This settlement will be subject to recognized audit procedures mutually satisfactory to both du Pont and the Operator and the mutually agreed value for the building or buildings, the value of land acquired and net rental accruals to date of termination will be deductible from the actual cost determination.

STATEMENT

Cross-petitioner seeks review of the same judgment involved in *E. I. du Pont de Nemours & Company* v. *Lyles & Lang Construction Company*, No. 785, this Term. The Statement in the petition filed on behalf of du Pont is equally applicable here, and reference thereto is respectfully made. To that Statement, the following facts, relevant to the present cross-petition, should be added:

By letter dated February 7, 1952, du Pont instructed Lyles & Lang to "temporarily cease all operations relative to Beech Island, South Carolina, site as of Thursday, February 7, 1952" (3 R. 584). In addition, the letter directed Lyles & Lang to furnish du Pont with the "total expenditures and commitments for this location as of the aforementioned 'cease operations' date,

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compiled in accordance with the 'cancellation for convenience' provision of our agreement" (3 R. 584). By letter from du Pont, dated March 5, 1952, Lyles & Lang was "notified that the subject agreement is partially terminated for the convenience of the Commission to the extent of thirty (30) of the seventy-five (75) dormitory type buildings covered thereby. It is assumed that the February 7, 1952, letter will constitute the required thirty (30) days notice and that this termination may be effective March 7, 1952 * * *" (3 R. 585).

Count two of the complaint seeks recovery of damages because of this termination, alleging that Section 3 (b) of the subcontract (*supra,* pp. 2–4) permits termination for convenience only as to dormitories that have been constructed and accepted for occupancy and, further, that the requisite 30 day notice of termination had not been given (1 R. 56–58). The District Court sustained both contentions and awarded Lyles & Lang some $110,000 as damages for breach of contract, *i. e.,* 20% of the *anticipated* total costs of construction of the dormitories at Beech Island (1 R. 30–34). This sum was in addition to the amount admittedly due under Section 3 (b) of the subcontract (*supra,* pp. 2–4), *i. e.,* the out-of-pocket expenses *actually* incurred by Lyles & Lang plus 20% of such actual costs for overhead and profit (1 R. 30–37).

The Court of Appeals reversed the award of damages under count two of the complaint, holding that Lyles & Lang is entitled to recover with respect to Beech Island only "on the same basis as for termination at other sites, i. e., costs incurred plus 20% thereon for overhead and profits less the value of land and salvage of materials" (App. 25a–28a).

ARGUMENT

In contrast with the petition filed on behalf of du Pont in No. 785, which raises questions of widespread importance with respect to standard form provisions customarily found in Government contracts and subcontracts, the questions presented by Lyles & Lang in this conditional cross-petition involve the construction of a special provision worded to cover the peculiar circumstances of this particular subcontract. Further, the answers to these questions turn, in large part, upon the specific facts of this case, and the ruling of the Court of Appeals was plainly correct. Since no general issue of contract law is presented and no conflict of decisions is suggested, further review of these questions is not called for.[2]

[2] It should be noted that the petition in No. 785 raises only a few issues of general importance although numerous other issues were resolved against du Pont and the United States in the court below (App. 1a–32a). Unlike cross-petitioner, we do not take the position that if these few issues warrant further review the Court "should review the entire case" (Pet. in No. 762, p. 4) and reverse

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1. The court below was clearly correc
cluding that "there was no limitation
right to terminate except the requireme
days' written notice" (App. 26a). Secti
of the subcontract (*supra*, pp. 2–4)
without qualification that "This Agre
any part thereof may be terminated by
subject to approval of the Commission,
convenience of the Commission." [E
added.] It then provides two methods
ment. In the event of a termination tak
12 months or more following the date
pancy, payment was to be computed in ac
with a schedule of lump sum payments.
event of termination "prior to twelve mo
lowing the date of occupancy," the paym
to be computed on a cost plus basis. Th
ing formulae for payment are specified
spect to different dates of termination c
viewed as limiting the unqualified l
quoted above, with which the terminatio
section commences. This would be so eve
standard for compensation in the event
mination prior to construction. In fact,
no such omission; the section provides a
applicable to termination *at any time* "
twelve months following the date of occ

learly correct in con-
limitation upon the
he requirement of 30
26a). Section 3 (b)
pp. 2–4) provides
"This Agreement or
rminated by du Pont
Commission, for the
ission." [Emphasis
two methods of pay-
mination taking place
ing the date of occu-
mputed in accordance
m payments. In the
to twelve months fol-
ncy," the payment was
lus basis. That vary-
are specified with re-
termination cannot be
unqualified language,
the termination provi-
uld be so even if the
failing to supply any
in the event of ter-
tion. In fact, there is
on provides a formula
at any time "prior to
he date of occupancy."

the judgment below with respect to the remain
which, in our view, were also erroneously decide

ct to the remaining issues
erroneously decided.

[Emphasis added.] To argue, as cross-petitioner does, that this language does not cover the present situation is to substitute "within" for "prior to."

As the court below pointed out, "nowhere was there any provision requiring that a building be completed and accepted for occupancy before the right to terminate would arise and we think it unreasonable to place any such interpretation upon the contract" (App. 26a). Indeed, in view of the fact that du Pont's prime contract could be terminated by the Commission "at any time" (Def. Ex. H, Sec. 7 (b), 3 R. 615), it would have been surprising had a comparable right not been reserved in the subcontract. To quote again from the opinion below, "The right of termination was inserted to protect against the burdensome guarantee in the event it should develop that the buildings were not needed; and if this appeared before construction or acceptance there was every reason why the cost of construction should be avoided or minimized by terminating the plaintiff's obligation to construct. No useful purpose could be served by requiring the construction of a building which was not needed—by requiring plaintiff to incur additional costs of construction in order that defendant might be required to pay additional amounts under its guaranty" (App. 26a). In answer, the cross-petition argues (Pet. 5) that the question is not whether unneeded dormitories were to be built but "whether Lyles & Lang is

entitled to the profits which it lost because of the termination." But it has long been a general policy of the Government that, on termination, profits are not to be paid on work that has not been done. See *e. g., United States* v. *Penn Foundry & Mfg. Co.*, 337 U. S. 198, 215–216 (concurring opinion). That general policy is an additional reason why it is highly unlikely that the termination clause contemplated payments of the unearned profits cross-petitioner seeks.

2. Alternatively, cross-petitioner relies upon an asserted failure to give the required 30 day notice as vitiating the termination. We believe adequate notice was given. The evident purpose of the 30 day notice requirement was to afford Lyles & Lang some time within which to wind up operations and cancel outstanding commitments in an orderly fashion. This purpose would seem to have been adequately accomplished by the letter of February 7, 1952 (3 R. 584), which directed Lyles & Lang to suspend operations and to submit a statement of its expenditures and commitments "compiled in accordance with the 'cancellation for convenience' provision of our agreement." If, however, it was not sufficient, "the only effect of the insufficiency," as the court below pointed out, "was to extend to April 4 the effective date of termination, and there is no evidence of any damage or inconvenience resulting from the delay" (App. 28a). Certainly nothing in this asserted

technical flaw in the termination notice warrants charging the United States with damages in excess of $110,000.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the cross-petition for a writ of certiorari should be denied.

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